

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MN

DAVID R. STEWART & MARY F. STEWART,)
)
 Petitioners,)
)
 v.) Docket No. 29963-14 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

This collection review case is before the Court on respondent's Motion to Dismiss for Lack of Jurisdiction, filed May 11, 2015. The Court called respondent's motion for an evidentiary hearing in Washington, D.C., on October 14, 2015. Both parties elected to file written statements with the Court in accordance with Rule 50(c).¹ Counsel for respondent appeared at the hearing and offered evidence and presented argument. No appearance was entered by or on behalf of petitioners at the hearing.

Background

On January 24, 2014, the Internal Revenue Service (IRS) issued to petitioner David R. Stewart a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing, regarding Federal trust fund recovery penalties assessed against him for the taxable periods ending March 31 and September 30, 2012 (TFRP notice).²

¹Section references are to the Internal Revenue Code, as amended, and Rule references are to the Tax Court Rules of Practice and Procedure.

²The trust fund recovery penalties were assessed against Mr. Stewart after Stewart Environmental Consultants, LLC (SEC) failed to pay over employment taxes for the periods mentioned.

From February 18 to April 7, 2014, the IRS issued multiple Letters 1058 to SEC regarding its unpaid Federal employment taxes for taxable periods ending in 2012 and 2013 (employment tax notices).³

On February 25, 2014, the IRS issued to Mr. Stewart and his wife, Mary F. Stewart (petitioners), a Letter 1058 related to Federal income tax that they reported for the taxable year 2012 but failed to pay (income tax notice). The income tax notice identified Revenue Officer John R. Vella (RO Vella), assigned to the IRS office in Ft. Collins, Colorado, as the “person to contact”. Mr. Stewart received the Letter 1058 on February 27, 2014. On that same date, David A. Spreccace (petitioners’ counsel) faxed to RO Vella powers of attorney for Mr. Stewart (individually) and SEC covering the taxable years 2000 to 2014.

On March 5, 2014, Mr. Spreccace mailed a Form 12153, Request for Collection Due Process Hearing, related to the TFRP notice to the IRS in Cincinnati, Ohio. Mr. Spreccace checked the box on the Form 12153 indicating that he was requesting an equivalent hearing. The Form 12153 was accompanied by Mr. Spreccace’s cover letter, dated March 5, 2014, which included a reference line stating “re: David Stewart”. The IRS received the Form 12153 on March 10, 2014.

On March 7, 2014, Mr. Spreccace sent a package by certified mail addressed to RO Vella. There is no dispute that the package included Mr. Spreccace’s cover letter, dated March 7, 2014, which included a reference line stating “re: Stewart Environmental Consultants LLC”. The package was received by an IRS employee on March 10, 2014. The parties disagree as to the remaining contents of the package. Mr. Spreccace contends that the package included a Form 12153 requesting an administrative hearing under section 6330 in respect of the income tax notice issued to the Stewarts. RO Vella stated in a sworn declaration (attached to respondent’s response filed June 29, 2015) that Mr. Spreccace’s March 7, 2014, letter was accompanied by a copy of an employment tax notice sent to SEC on March 5, 2014, and a Form 12153, signed by Mr. Spreccace, requesting an administrative hearing for SEC in respect of employment tax due for the taxable period “1303”.⁴

³The collections actions against SEC are the subject of a petition for review filed at docket No. 24244-14L.

⁴The Court notes that the employment tax notice dated March 5, 2014, concerns tax due for the period ending September 30, 2013, while the Form 12153

On March 10, 2014, Mr. Sprecase sent a letter to RO Vella stating: “I appreciate your letting me know of all periods under CDP levy possibility. I sent a Form 12153 to ACS Support [in Cincinnati] for 1203 and 1209, but I did not see a CDP levy notice from you for those periods. A Form 12153 for 1209, 1303, 1306, and 1306 is enclosed.” The Form 12153 attached to Mr. Sprecase’s letter refers to the periods listed above as well as the period “1309”, indicating that the second reference in Mr. Sprecase’s letter to the period “1306” was a typographical error.

The IRS Office of Appeals (Appeals Office) assigned petitioners’ case to Settlement Officer Colleen Girard. SO Girard determined that petitioners had first sent a Form 12153 to the IRS regarding the income tax notice on April 4, 2014, and, therefore, she concluded that their request for an administrative hearing was untimely. On November 12, 2014, the Appeals Office issued to Mr. Stewart a Decision Letter Concerning Equivalent Hearing in respect of the income tax notice sustaining the proposed levy action.

On December 16, 2014, petitioners filed a joint petition for review under section 6330 asserting that they timely requested an administrative hearing in respect of the income tax notice. The petition arrived at the Court in an envelope bearing a U.S. Postal Service postmark dated December 12, 2014.

Discussion

Section 6331(a) authorizes the Secretary to levy upon property and property rights of a taxpayer liable for taxes who fails to pay those taxes within 10 days after a notice and demand for payment is made. Section 6331(d) provides that the levy authorized in section 6331(a) may be made with respect to unpaid tax only if the Secretary has given written notice to the taxpayer 30 days before the levy. Section 6330(a)(3) requires that the written notice include the amount of the unpaid tax and an explanation of the taxpayer’s right to request an administrative hearing within 30 days from the date of the notice. See sec. 6330(a)(2); sec. 301.6330-1(b)(1), *Proced. & Admin. Regs.*⁵

refers to the period “1203”--presumably a reference to the taxable period ending March 30, 2012.

⁵There is no dispute that petitioners received proper notice of the proposed levy in the form of Letter 1058--the income tax notice.

In accordance with section 6330(b)(1), the Appeals Office is charged with conducting the administrative hearing. If the taxpayer fails to request an administrative hearing within the prescribed 30-day time period, however, the Appeals Office will afford the taxpayer an equivalent hearing. See sec. 301.6330-1(i)(1), Proced. & Admin. Regs. The Appeals Office will issue a decision letter to a taxpayer who has received an equivalent hearing. A decision letter does not constitute a “determination” within the meaning of section 6330(d), and, thus, does not provide a basis for invoking the Court’s jurisdiction. See Moorhous v. Commissioner, 116 T.C. 263, 270 (2001). But see Craig v. Commissioner, 119 T.C. 252 (2002) (decision letter issued after timely request for an administrative hearing constituted a notice of determination).

The Tax Court is vested with jurisdiction to review a notice of determination issued by the Appeals Office. Sec. 6330(d)(1). The Court’s jurisdiction under section 6330 depends upon the issuance of a valid notice of determination and the filing of a timely petition for review. See Goza v. Commissioner, 114 T.C. 176, 182 (2000); Moorhous v. Commissioner, 116 T.C. at 269; see also Rule 330(b). Petitioners bear the burden of proving that this Court has jurisdiction by establishing affirmatively all facts giving rise to our jurisdiction. See Patz v. Commissioner, 69 T.C. 497, 503 (1977); Fehrs v. Commissioner, 65 T.C. 346, 348 (1975).

Respondent maintains that the Court lacks jurisdiction in this case on the ground that no notice of determination was issued to petitioners in respect of the proposed levy action regarding their unpaid income tax for 2012. In particular, respondent contends that petitioners failed to submit to the Appeals Office a timely request for an administrative hearing under section 6330 in respect of the income tax notice, and, therefore, the Appeals Office acted properly in granting petitioners an equivalent hearing and issuing a decision letter that does not confer appeal rights to the Tax Court.

Petitioners contend that they submitted to the IRS a timely request for an administrative hearing. Specifically, they assert that Mr. Sprecase sent a Form 12153 requesting an administrative hearing in respect of the income tax notice to RO Vella by certified mail on March 7, 2014, and the IRS received that package on March 10, 2014 (i.e., within 30 days of the mailing of the income tax notice) .

There is no dispute that Mr. Sprecase sent a package to RO Vella by certified mail on March 7, 2014, the IRS received the package on March 10, 2014, and the package included a cover letter from Mr. Sprecase that referred to “Stewart

Environmental Consultants, LLC”. Beyond that, there is considerable uncertainty as to the remaining contents of the package. Whereas Mr. Sprecase asserts that he placed a Form 12153 related to the income tax notice in the package, RO Vella states that his records show that the package contained a Form 12153 making reference to the tax period “1203” and a copy of the employment tax notice issued to SEC on March 5, 2014.

The Court has reviewed the record in considerable detail and finds that petitioners have not produced persuasive evidence that the package in question contained a request for an administrative hearing in respect of the income tax notice. Without more, we are compelled to find--as RO Vella maintains and as indicated in Mr. Sprecase’s cover letter--that the package contained items related to proposed levy actions against SEC. We conclude that petitioners did not timely request an administrative hearing in respect of the income tax notice. Under the circumstances, the decision letter dated November 12, 2014, upon which the petition in this case is based, does not amount to a determination that would permit petitioners to invoke the Court’s jurisdiction under section 6330(d). See Kennedy v. Commissioner, 116 T.C. 255 (2001). It follows that we are obliged to grant respondent’s motion to dismiss.

The premises considered, it is

ORDERED that respondent’s Motion to Dismiss for Lack of Jurisdiction, filed May 11, 2015, is granted and this case is dismissed for lack of jurisdiction.

(Signed) Daniel A. Guy, Jr.
Special Trial Judge

ENTERED: **OCT 23 2015**